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Supreme Court of the United States.

NO. 21, OCTOBER TERM, 1903.

DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

PETITION FOR REHEARING AND MODIFYING JUDGMENT AS TO COSTS OF APPEAL.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
COUNSEL FOR APPELLANT.

Supreme Court of the United States.

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No. 21.

DEFIANCE WATER COMPANY,
Appellant,

vs.

THE CITY OF DEFIANCE ET AL.,
Appellees.

Petition for Rehearing and Modifying Judgment as to Costs of Appeal.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The said appellant in this cause, decided November 30, 1903 (191 U. S. 184), respectfully asks for a rehearing thereof; it suggests especially that the judgment of this court should be modified as to the costs of the appeal.

The court holds that the appeal was properly taken from the Circuit Court to this court and it reverses the judgment below, *at the cost of the appellant*, and remands the cause to the Circuit Court with order to dismiss the bill of complaint, for the reason that it is not clearly and fully set forth in the bill that the rights of the complainant, guaranteed by the Constitution of the United States, have been violated by the defendants.

We concede that the facts which give the court below jurisdiction must be set forth in the bill, and that this jurisdiction can not be aided or defeated by the subsequent proceedings in the suit.

We respectfully suggest that between courts of concurrent jurisdiction, we not only had the right, but it was our duty to litigate the complainant's claim in that forum wherein his rights would be best subserved.

In addition to the cases cited in appellant's supplemental brief, page 7, *see*

Pierce v. *Feagans*, 39 Fed. Rep. *588*.
Stanton v. *Embrey*, 93 U. S. *554*.

The complainant's counsel brought this suit in good faith in the court below, as one in which there was a controversy "arising under the Constitution of the United States," and fully believing that the Federal court had concurrent jurisdiction with the state court of the suit. In this opinion they were sustained by the Circuit Court (Judge Severens, 90 Fed. Rep. 753,) and it would seem that the Vicksburg case, (185 U. S. 65,) a suit based on a contract and facts similar to, if not identical with those in this suit, especially

as regards the question of jurisdiction, was conclusive of the jurisdiction of the court below on the facts, if properly pleaded in the bill. *See* also, *Los Angeles* v. *Los Angeles Water Co.*, 177 U. S. 558.

The jurisdiction of the court below was not based solely on the resolution or ordinance of the City Council of January 7, 1896, but on many other acts of the City Council, fully noted, with references to the record, on pages 37 and 38 of appellant's main brief; especially was the action of the City Council in the resolution of February 18, 1897 (Rec. p. 147), instructing the city solicitor to sue to enjoin the shutting off of water from the city and public, while they were still using it without paying therefor, an infringement of the complainant's constitutional rights.

We respectfully suggest, in view of the opinion of this court, that we should be permitted to amend our bill in the court below, upon such terms as may be just, as the amendment would contain nothing not now appearing in the record.

We respectfully submit that the costs of appeal to this court should be wholly taxed against the appellees or, if the court so find, should be apportioned between the parties in such manner as may be just. It is not the ordinary case of failure to properly plead the diverse citizenship of the parties, by reason of which the court below did not acquire jurisdiction. The judgment of the court below, which this court now reverses, was on a supplemental issue raised by the defendants, entirely foreign to the bill. In view of what we have said *supra*, in support of our petition for rehearing,

it would seem but just and right that the costs of this reversal should be adjudged against the defendants if the petition is denied.

Mansfield, Coldwater, etc., Ry. Co. v. *Swan*, 111 U. S. 379.

Hancock v. *Holbrook*, 112 U. S. 232.

Peper v. *Fordyce*, 119 U. S. 469.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Counsel for Appellant.

We hereby certify that in our opinion the foregoing petition is well founded.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Counsel.